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# **The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law**

**Jed Odermatt**

iCourts - The Danish National Research Foundation's  
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Forthcoming in Achilles Skordas (ed), Research Handbook on the International Court of Justice, Edward Elgar

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**Abstract:**

This chapter discusses how the Court of Justice of the European Union (CJEU) has used judgments of the International Court of Justice (ICJ) in its legal reasoning. The CJEU uses ICJ jurisprudence in three main ways: when discussing customary international law, when applying the law of treaties, and when using international law to interpret and develop principles of EU law. The chapter reviews the cases in which the CJEU and the Advocates General have discussed ICJ cases, including areas of international humanitarian law, diplomatic and consular law, nationality and citizenship, the law of the sea, and the international law of treaties. On the one hand, the CJEU's use of ICJ case law may show its commitment to the universality and coherence of international law. However, the CJEU also has a strong commitment to the coherence and unity of EU law, and has emphasised the autonomy of the EU legal order. The chapter shows that, upon closer inspection, the CJEU interprets and applies ICJ jurisprudence through an EU law prism. It also shows that, over time, principles of international law are transformed into principles of EU law. In these instances, the CJEU no longer refers to ICJ/PCIJ jurisprudence, but as autonomous EU law principles. ICJ jurisprudence is used to fill gaps, or to support certain legal arguments, but it is not followed as if it were a hierarchically superior court.

**KEYWORDS:** International Court of Justice, Court of Justice of the European Union, Universality, Fragmentation, Coherence, Customary international law, EU law

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# The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law

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Forthcoming in Achilles Skordas (ed), *Research Handbook on the International Court of Justice*,  
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## 1 Introduction

The International Court of Justice, housed at the Peace Palace in The Hague, and the Court of Justice of the European Union, just over 300 kilometres south in Luxembourg, are two very different types of international court. As the “principal judicial organ of the United Nations”,<sup>1</sup> the International Court of Justice (ICJ) is truly a ‘world court’. It resolves legal disputes submitted to it through its contentious jurisdiction, and answers legal questions submitted to it through its advisory jurisdiction. Through these judgments and opinions, the ICJ also contributes to the universal character of international law. For instance, the ICJ has consistently upheld that international law is a single system that applies to all states, comprised of a set of universal rules.<sup>2</sup>

The Court of Justice of the European Union (CJEU), which includes the Court of Justice (CJ) and the General Court (GC), is the court of a regional supranational organization, the European Union. Many would argue that the CJEU should not be considered an international court at all, and that it more closely resembles a constitutional court for Europe. While its primary goal is to interpret and apply the two founding EU Treaties and EU law, its everyday practice appears to resemble a domestic court. On a given day, it might hear cases on copyright protection, competition law, the freedom of movement, or the law governing the EU institutions. This contrasts with the work of the ICJ, dealing

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<sup>1</sup> Art. 92, Charter of the United Nations.

<sup>2</sup> See M. Andenas & E. Bjorge (eds), ‘Introduction: from fragmentation to convergence in international law’ in *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015) “the International Court has in this way not only shown that international law is a single, unified system of law but, in doing so, reasserted its own position in this system, that is, at the centre of the international legal system.”

with issues such as maritime delimitation, armed conflict, or the legality of nuclear weapons. Whereas the ICJ has jurisdiction to resolve issues of international law between states, the CJEU has a narrower role, that is, to resolve disputes regarding EU law. Whereas the ICJ must wait for states to submit cases and UN organs to submit requests for advisory opinions, the CJEU has compulsory jurisdiction, and can hear cases brought by the EU institutions, EU Member States, and certain individuals. Just as the ICJ promotes the universal character of international law, the CJEU has also been instrumental in promoting the coherence of EU law, particularly by promoting the autonomy of the EU legal order. It may appear, based on these differences, that the two courts operate in entirely separate worlds. The ICJ faces legal issues on the plane of international law and disputes between states, whereas the CJEU is focused primarily on EU law. Yet over time, there has been much more interaction between Luxembourg and The Hague. These two Courts, both based in Europe, and both born out of war on that continent, are committed to the project of promoting peace. Moreover, the courts have both faced similar and overlapping legal issues.

This chapter examines this relationship between these two international courts. It focuses primarily on how the CJEU has dealt with ICJ jurisprudence, by discussing CJEU judgments and Advocate General opinions that have referred to or cited ICJ judgments. The CJEU deals with the ICJ judgements in three main ways: when discussing customary international law, when applying the law of treaties, and when using international law to interpret and develop principles of EU law. These three issues overlap. For example, the CJEU applies the principles of the *1969 Vienna Convention on the Law of Treaties* (VCLT) as a source of customary international law, and by doing so, develops internal EU law on the way that the EU law and international law sources interact.

The ICJ has had an important role in establishing and clarifying principles of international law, and in so doing promotes the coherence, even universality, of that system.<sup>3</sup> One might expect, then, that the CJEU would show a certain deference to the ICJ when dealing with issues of international law. Yet this is not always the case. At times, the CJEU appears open to citing ICJ authority. But the CJEU also shows a certain boldness. It may appear to follow ICJ case law, but do it in a way that diverges from it in some respects. For example, in a rather subtle manner, it may cite an ICJ judgment to support a proposition, but go further than the ICJ did in that judgment. In other instances, the CJEU does not refer to ICJ jurisprudence. The CJEU is, first and foremost, a court of the EU, and when it applies ICJ case law, it does so in order to interpret and apply *EU law*. The CJEU therefore views the

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<sup>3</sup> B. Simma, 'Universality of International Law from the Perspective of a Practitioner' 20 *European Journal of International Law* 2 (2009) 265–297. M. Andenas and E. Bjorge, *A Farewell to Fragmentation Reassertion and Convergence in International Law* (CUP, 2015).

ICJ's case law as a secondary source of law in the EU legal order. It is capable of informing the CJEU when dealing with international law issues, but is by no means viewed as a superior court.

The following sections discuss how the CJEU has dealt with ICJ jurisprudence. It examines the judgments and opinions of Advocates General that mention the international court and its case law.<sup>4</sup> It does not discuss, however, instances where the CJEU had a chance to refer to an ICJ case but did not do so. It therefore only examines instances where the CJEU chose to refer to the ICJ. It may have done this upon its own initiative, or because, the parties made references to ICJ case law in their arguments and submissions.

Whereas the CJEU sometimes cites and discusses ICJ judgments, the reverse is not the case. It is unlikely that the ICJ would discuss CJEU judgments unless a question arose regarding EU law. Yet, because the EU Treaties forbid the EU Member States from submitting disputes related to EU law to any judicial body other than the CJEU, it is very unlikely that the ICJ would ever hear such a dispute.<sup>5</sup> If an EU Member State were to bring proceedings before the ICJ that touched upon EU law, the European Commission would almost certainly bring infringement proceedings against that state. For instance, in the *Mox Plant* case, the CJEU found that Ireland breached its obligations under Article 292 TEC (now Art. 344 TFEU) by submitting a dispute against the UK that would have involved the interpretation of EU law.<sup>6</sup> While the arbitral tribunal considered that it had *prima facie* jurisdiction, it noted that the dispute between Ireland and the United Kingdom before the ECJ would be binding under EU law, and may lead to conflicting decisions. The Tribunal decided to suspend the proceedings.<sup>7</sup>

The ICJ's docket once featured a number of European States, and some of its landmark cases dealt with countries that are now members of the European Union.<sup>8</sup> In later decades, the ICJ's cases have dealt with countries outside Europe. EU membership has arguably made the use of the ICJ between Member States less likely. It is only in cases where there is no EU law dimension, such as the dispute

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<sup>4</sup> The chapter does not discuss instances where references to the ICJ were incidental or minor.

<sup>5</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345 ('MOX Plant').

<sup>6</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345 ('MOX Plant').

<sup>7</sup> President's Statement of June 13, 2003, *Ireland v. United Kingdom* <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1148](http://www.pca-cpa.org/showpage.asp?pag_id=1148)>, para. 11. "The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them."

<sup>8</sup> E.g. *Case concerning the Barcelona Traction, Light and Power Co Ltd* (New Application: 1962) (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3; *Monetary Gold Removed from Rome in 1943* (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question) [1954] ICJ Rep 19; *North Sea Continental Shelf* (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands) (Merits) [1969] ICJ Rep 4.



between Italy and Germany in *Jurisdictional Immunities*, where EU Member States brought proceedings against one another. Even in this case, Germany made a declaration stating that the dispute did not involve an EU law dimension.<sup>9</sup> When Belgium instituted proceedings against Switzerland in *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (Belgium v. Switzerland), a case involving the interpretation and application of the Lugano Convention, Belgium declared that the Court of Justice of the European Communities “is without jurisdiction in the area”.<sup>10</sup> Although Belgium discontinued proceedings in this case, Hoffmeister argues that any ICJ judgment “would have dealt with a matter which had become a matter of Union law under the revised 2007 Lugano Convention” since the CJEU had found that it is exclusively competent in the field covered by the Lugano Convention.<sup>11</sup>

Although it is not a UN member or a party to the ICJ Statute, the European Union could potentially appear before the ICJ in some proceedings. The EU often appears in various international dispute settlement bodies, either as a party to the proceedings, or to brief a tribunal on issues of EU law. Yet it has never appeared before the ICJ. Hoffmeister has discussed the possibility of the EU appearing before the ICJ via Article 43(2) of the ICJ’s Rules of Court.<sup>12</sup> The European Union may also give information to the Court in the context of advisory proceedings. For instance, on 18 January 2018 the ICJ found that the African Union would be able to furnish information to the Court regarding the question submitted to the ICJ for an advisory opinion in *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*.<sup>13</sup>

## 2 The CJEU and International Law

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<sup>9</sup> ICJ Press Release No. 2008/44 of 23 December 2008, 2: “Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that “specific framework” the Member States “continue to live with one another under the regime of general international law.”

<sup>10</sup> ICJ Press Release 2009/36, 22 December 2009, 2.

<sup>11</sup> F. Hoffmeister, ‘The European Union and the Peaceful Settlement of International Disputes’ 11 *Chinese Journal of International Law* 1 (2012) 85.

<sup>12</sup> F. Hoffmeister, *supra* note 11, 77. Article 43 (2) ICJ Rules of Court: “Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall so notify the public international organization concerned. Every public international organization notified by the Registrar may submit its observations on the particular provisions of the convention the construction of which is in question in the case.”

<sup>13</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para. 7. By an Order dated 17 January, 2018, the ICJ decided that the African Union was likely to be able to furnish information on the questions submitted to the Court for an advisory opinion

In order to understand the CJEU's relationship with the International Court of Justice, it is important to discuss the CJEU's relationship with international law. The relationship between the CJEU and international law is a complex issue, and has been subject to quite some academic discussion in recent years. The starting point is that the CJEU does not consider the EU Treaties to be part of the international legal order. Although the EU's founding documents are strictly treaties from the perspective of public international law, the CJEU has held that when establishing the European Communities, the EU Member States created a 'new legal order'.<sup>14</sup> This has had an effect on the way the CJEU approaches other international law instruments. In order for the CJEU to apply and interpret international law, it must have 'entered' the EU legal order. In terms of hierarchy, then, international law is binding on the Union, but is considered as sitting between primary EU law (the EU Treaties, the Charter of Fundamental Rights and general principles of EU Law) and EU secondary law (EU Directive, Regulations). Moreover, the CJEU has set out certain conditions under which international law may enter the EU legal order.

Judge Rosalyn Higgins contrasts the CJEU's approach to international law with that of the European Court of Human Rights.<sup>15</sup> The CJEU views EU law, not as a specialised form of international law, but as an autonomous legal order. Contrast this with the ECtHR, which views its role as interpreting a specialised field of international law, that is, the European Convention on Human Rights. The ECtHR will therefore seek to interpret and apply the Convention in accordance with other principles of international law. This is in stark contrast to the CJEU, which will not use international law to interpret the EU Treaties. For instance, the CJEU has applied the principles of the 1969 VCLT to interpret international agreements, but does not apply such principles when interpreting the EU Treaties themselves.

The CJEU deals with international law in two main ways. The first is when international law is dealt with as part of the EU legal order. When the EU adopts an act, "it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union".<sup>16</sup> This is based on Article 3(5) TEU, according to which the Union is to contribute to the strict observance and the development of international law. International law that is binding on the EU is considered to be part of the EU legal order. In these instances, the CJEU might

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<sup>14</sup> Judgment of 5 February 1963 in *van Gend & Loos*, 26/62, EU:C:1963:1, 12.

<sup>15</sup> R. Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' 52 *International and Comparative Law Quarterly* 1 (2003) 1, 6.

<sup>16</sup> Judgment in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864, para. 101.

be called upon to decide whether a particular EU instrument is compatible with rules of international law, both treaties and customary international law.

The second is where the CJEU is called upon to answer questions of public international law that arise when interpreting and applying EU law. In the latter scenario, international law is not used as a sword to challenge the legality of an EU law instrument, but as a tool in the Court's reasoning. The CJEU's approach to international law, and its use of ICJ jurisprudence, depends on whether it is using international law in the first method, reviewing the legality of EU acts, or in the second method, using international law to support its reasoning. When international law is a tool to interpret and apply EU law, the CJEU has been quite open to the use of ICJ jurisprudence. Higgins points out that "[t]he purposes for which Public International Law is involved before the European Court are various and interesting. And it is fascinating for an international lawyer to see, through the prism of the jurisprudence of the European Court, the place of Public International Law in the legal disputes of the Community."<sup>17</sup> The following sections discuss how the CJEU has dealt with ICJ jurisprudence. It shows that the CJEU often uses the ICJ jurisprudence as a short cut route to discover international law rules, but rarely engages with the reasoning of the ICJ judgments.

### 3 Customary International Law

The main way that the CJEU has dealt with ICJ jurisprudence is in order to identify principles of customary international law. The CJEU has held that the EU must respect international law in the exercise of its powers, including customary international law, yet it may not always be clear whether a particular principle has the status of customary international law. First, it uses ICJ jurisprudence as a 'short-route' to find the existence of a principle of customary international law.<sup>18</sup> The CJEU does not usually undertake an independent analysis of whether a particular principle has the status of customary international law, by looking, for instance at whether state practice and *opinio juris* support the customary character of a rule. Rather, it will usually refer to a case of the ICJ or PCIJ. There are a number of fields of public international law where the CJEU has cited ICJ jurisprudence regarding customary international law.

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<sup>17</sup> Higgins, *supra* note 15, 6.

<sup>18</sup> "[T]he International Court of Justice's findings as a useful short-route to identifying what customary international law on a given topic may be." Higgins, *supra* 15, 10.

### 3.1 International Humanitarian Law

The CJEU has encountered ICJ jurisprudence in cases dealing with international humanitarian law (IHL). For instance, it has discussed how common Article 3 of the Geneva Conventions and Protocol I have the status of customary international law. In *A and Others v Minister van Buitenlandse Zaken*,<sup>19</sup> Advocate General Sharpston referred to the *Nicaragua v United States* and the *Nuclear Weapons* Advisory Opinion.<sup>20</sup> *Nicaragua* is cited to support the argument that the rules in common Article 3 reflect customary international law, which ‘constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts’ and that they reflect ‘elementary considerations of humanity’.<sup>21</sup> In this case, A and Others argued that Liberation Tigers of Tamil Eelam (LTTE) could not be classified as a terrorist organization under EU law, because it was engaged in an ‘armed conflict’, within the meaning of international humanitarian law, with the Sri Lankan government. AG Sharpston found that international humanitarian law does not prohibit the adoption of preventative measures of the type to which LTTE was subject. The Court did not mention the ICJ, however. It found that international humanitarian law and the EU law provisions in question, pursue different aims and introduce different mechanisms. Referring to its earlier ruling in *Diakité*, the Court found that the application of the Common Position and Regulation in question do not depend on classifications stemming from international humanitarian law.<sup>22</sup> Like in *Diakité*, the Court found that IHL and EU law exist in separate spheres of operation.

In *Diakité*, AG Mengozzi similarly cited the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion to assert that the Geneva Conventions and the Additional Protocols constitute ‘intransgressible principles of international customary law’.<sup>23</sup> The Advisory Opinion was also cited the ICJ when discussing how IHL constitutes one complex system comprising of ‘Hague law’ and ‘Geneva law’.<sup>24</sup> The Advocate General did so in order to make the point that, even though those instruments are not binding upon the Union, they represent customary law, and as such are binding on the EU, and that EU law should therefore be interpreted consistently with those rules. Nonetheless,

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<sup>19</sup> Opinion of Advocate General Sharpston, *A and Others v Minister van Buitenlandse Zaken*, EU:C:2016:734.

<sup>20</sup> ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, paras 78 and 79, cited at footnote 5, *A and Others*, *supra* note 19.

<sup>21</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14, paragraphs 218 and 219, cited at footnote 92, *A and Others*, *supra* note 19.

<sup>22</sup> Judgment in *A and Others v Minister van Buitenlandse Zaken*, EU:C:2017:202, para. 91.

<sup>23</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, paragraph 79; cited by in Opinion of Advocate General Mengozzi, Case C-285/12 *Aboubacar Diakité V Commissaire général aux réfugiés et aux apatrides*, EU:C:2013:500, at footnote 24.

<sup>24</sup> Opinion of Advocate General Mengozzi, *supra* note 23, para 29.

the AG and the Court found that the meaning of ‘internal armed conflict’ in the Qualification Directive did not have same meaning as a ‘non-international armed conflict’ under IHL. One might make the argument that *Diakité* contributes to a form of fragmentation here, since they both take a different approach the notion of an armed conflict that is not international in character. However, here the EU law in question and the relevant IHL provisions do have very different purposes and aims. Although they use similar terms, they are used for very different purposes.<sup>25</sup>

In *Joined Cases T-208/11 and T-508/11, Liberation Tigers of Tamil Eelam (LTTE)*,<sup>26</sup> LTTE argued that placing LTTE on a list relating to freezing of funds violates the ‘principle of non-interference’ under IHL, by constituting an interference with a third country in an armed conflict. The CJEU quickly dismissed this argument. While it found the principle of non-interference exists, referring to the ICJ’s *Nicaragua* judgment,<sup>27</sup> it found that the principle is set out for the benefit of sovereign states “and not for the benefit of groups or movements.”<sup>28</sup>

In *Kadi*, perhaps the most well-known CJEU judgment involving international law, there is very little engagement with the ICJ. However, Advocate General Maduro made passing reference to the *Lockerbie* case (Libyan Arab Jamahiriya v. United Kingdom, Provisional Measures) to support the argument that Article 103 of the UN Charter applies to binding decisions of the UN Security Council.<sup>29</sup> The Court of First Instance (as it then was) also made a number of references to ICJ judgments, including *Lockerbie*,<sup>30</sup> to support the primacy of resolutions of the UN Security Council. In that case, the Court of First Instance found that it had the power to conduct, ‘indirect judicial review’ of UN Security Council resolutions, limited to violations of *jus cogens* norms. In making this argument, the Court of First Instance referred to the 1996 *Nuclear Weapons* Advisory Opinion, to support the idea that *jus cogens* norms constitute “intransgressible principles of international customary law” from which neither the Member States nor the UN bodies may derogate.<sup>31</sup>

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<sup>25</sup> See further, J. Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’ 3 *Cambridge Journal of International and Comparative Law* 3 (2014) 696, 714.

<sup>26</sup> Judgment in *T-208/11 - LTTE v Council*, EU:T:2014:885.

<sup>27</sup> *LTTE v Council*, *supra* note 26, para 69.

<sup>28</sup> *LTTE v Council*, *supra* note 26, para 69.

<sup>29</sup> Opinion of Advocate General Maduro, C-415/05 P *Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:30, para 18.

<sup>30</sup> Judgment in *T-315/01 - Kadi v Council and Commission*, EU:T:2005:332. In particular, the CFI referred (at para 184) to Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United States of America), ICJ Reports, 1992, p. 16, para. 42, and Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom), ICJ Reports, 1992, p. 113, para. 39.

<sup>31</sup> *Kadi v Council and Commission (CFI)*, *supra* note 30, para. 231.

### 3.2 Diplomatic and Consular Law

The CJEU has also dealt with the customary law status of the Vienna Convention on Consular Relations (VCCR),<sup>32</sup> particularly those relating to the privileges and immunities of consular officers and consular employees. In *Evans*, AG Wahl found that the ICJ had not stated that the VCCR provisions reflect customary international law, but represent ‘principles which are deeply rooted in international law’.<sup>33</sup> AG Wahl refers to the ICJ judgment in *United States Diplomatic and Consular Staff in Tehran*,<sup>34</sup> which sets out that the VCCR provisions ‘codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions’.<sup>35</sup> AG Wahl then found that Articles 48 and 71 of the VCCR on privileges and immunities represent customary international law. The question in this case related to the calculation of old age pension benefits for Ms Evans, who had been employed by the British Consulate General in Rotterdam. The Court looked at whether the provisions of the VCCR relating to the privileges of consular staff had the status of customary international law before the Convention had come into force for the Netherlands. Duquet notes that, unlike its sister convention, the *Vienna Convention on Diplomatic Relations*,<sup>36</sup> the VCCR was not seen as a straightforward exercise of ‘codifying’ customary international law.<sup>37</sup> This is evidenced by the fact, during the drafting of the VCCR, there was far less agreement among delegates on a disputed issues of consular law, contrary to the diplomatic law counterpart. While it is accepted by scholars that the VCCR represents customary international law, it is more disputed which articles have acquired customary status, and, as was important in this case, at which point in time. The Court adopted the position of AG Wahl, without any discussion of the negotiating history of the VCCR, and by merely mentioning the quoted passage from the *Iran Hostages* case. This is arguably an example of the CJEU going further than what the ICJ had stated, by finding that the VCCR, at the relevant time, had the status of customary international law.

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<sup>32</sup> *Vienna Convention on Consular Relations* (24 April 1963) 596 UNTS 261, entered into force 19 March 1967.

<sup>33</sup> Opinion of Advocate General Wahl, *Case C-179/13, Raad van bestuur van de Sociale verzekeringsbank v L.F. Evans*, EU:C 2014:2015, para. 36.

<sup>34</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 3, para 45, cited in Opinion of Advocate General Wahl, *supra*, footnote 18.

<sup>35</sup> Opinion of Advocate General Wahl, *supra* note 33, para 36.

<sup>36</sup> *Vienna Convention on Diplomatic Relations* (18 April 1961) 500 UNTS 95, entered into force 24 April 1964.

<sup>37</sup> S. Duquet, Oxford Reports on International Law, Commentary to ‘Raad van bestuur van de Sociale verzekeringsbank v Evans, Judgment, C-179/13, ILEC 078 (CJEU 2015), 15th January 2015, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]; European Court of Justice (5th Chamber)’ International Law in EU Courts (ILEC) <<http://opil.ouplaw.com>>.

*Opinion 2/13* dealt with question of who was competent to conclude the EU-Singapore Free Trade Agreement (EUSFTA).<sup>38</sup> Was the EU competent to conclude the EUSFTA alone, or did the agreement also require the participation of the EU Member States? One of the issues in this case dealt with the ‘Investor-State Dispute Settlement’ (‘ISDS’) mechanism in the agreement. Under the EUSFTA neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party have consented to submit or has submitted to arbitration. The Council argued that the EU does not have competence to legislate in the field of diplomatic protection, as only the EU Member States had the competence to decide whether or not give diplomatic protection in a particular case. Advocate General Sharpston looked to the definition of diplomatic protection in international law. The opinion cited the International Law Commission’s 2006 Draft Articles on Diplomatic Protection,<sup>39</sup> the Permanent Court of International Justice,<sup>40</sup> and the ICJ.<sup>41</sup> Citing the ICJ’s *Interhandel* case (*Switzerland v. United States of America*), AG Sharpston found that it is a principle of customary international law that “before a State gives diplomatic protection to its injured nationals, those nationals must first have exhausted local remedies.”<sup>42</sup> In *Hungary v. Slovakia*<sup>43</sup>, the Court determined that privileges and immunities enjoyed by a Head of State were part of customary international law.<sup>44</sup> However, the Court came to this conclusion without any analysis or references to international or domestic case law.

### 3.3 Nationality and Citizenship

The CJEU has also referred to ICJ jurisprudence relating to questions of nationality and citizenship. The CJEU has been instrumental in developing and defining the concept of EU citizenship. Yet the

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<sup>38</sup> *Opinion 2/15*, EU:C:2017:376.

<sup>39</sup> United Nations International Law Commission, Draft Articles on Diplomatic Protection with commentaries (2006), adopted by the International Law Commission at its fifty-eighth session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10), Yearbook of the International Law Commission, 2006, vol. II, Part Two (‘UN ILC Draft Articles on Diplomatic Protection’), Article 1 and Commentary on Article 1, para. 2.

<sup>40</sup> Permanent Court of International Justice, *Mavrommatis Palestine Concessions* (Greece v. UK), PCIJ Reports, 1924, Series A, No 2, p. 12.

<sup>41</sup> *Case concerning the Barcelona Traction Light and Power Company Limited* (Belgium v. Spain), Second Phase, judgment of 5 February 1970, ICJ Reports 1970, p. 3, at para 78. *Interhandel* (Switzerland v. United States of America), Preliminary objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 6, p. 27.

<sup>42</sup> *Opinion 2/15*, *supra* note 38, para 539.

<sup>43</sup> Judgment in *Hungary v. Slovakia*, C-364/10, EU:C:2012:630.

<sup>44</sup> *Hungary v. Slovakia*, *supra* note 43, para. 46: “[O]n the basis of customary rules of general international law ... the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities.”

starting point of the Court is that international law and EU law leaves it to the state to decide the conditions regarding the acquisition of nationality.

In *Brouillard*,<sup>45</sup> the Belgian referring court sought guidance on whether the function of a legal secretary for the *Cour de cassation* should be considered ‘employment in the public service’, within the meaning of Article 45(4) TFEU. The CJEU considered its previous case law, including *Alevizos*,<sup>46</sup> a case dealing with an officer in the Greek Air Force who had been temporarily posted to North Atlantic Treaty Organisation (NATO). According to Article 45 (4) TFEU, the provisions on the free movement of workers do not apply to “employment in the public service”. This is based on the idea of “the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.”<sup>47</sup> Advocate General Sharpston highlighted how this definition in EU law stems from the ICJ’s *Nottebohm* case.<sup>48</sup>

The *Nottebohm* case is used as authority for the principle that the granting of nationality by a state is only entitled to be recognised where there is a “genuine connection” between the individual and the State granting nationality. In this case, Liechtenstein was not able to take up a case against Guatemala based on the nationality of Mr Nottebohm (a German national who had obtained Liechtenstein nationality), because there had been no prior genuine link between Mr Nottebohm and Liechtenstein.<sup>49</sup> *Nottebohm* has been cited in a number of cases in support of this principle in the EU context.<sup>50</sup>

The CJEU faced similar issues in *Rottman*.<sup>51</sup> According to the CJEU’s case law, it is for the EU Member States, having regard to relevant Union law, to set out the conditions for the acquisition and loss of nationality.<sup>52</sup> In this case, the Federal Administrative Court asked the CJEU whether a decision by a Member State on naturalisation that causes an EU citizen to lose his or her EU citizenship and renders them stateless, violates EU law. The CJEU found that the question falls within the ambit of Union law by virtue of the “nature and its consequences”.<sup>53</sup> Whereas the CJEU did not examine international law when coming to this conclusion, Advocate General Maduro’s starting point was the

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<sup>45</sup> Judgment in *Brouillard*, C-298/14, EU:C:2015:652.

<sup>46</sup> Judgment in *Alevizos*, C-392/05, EU:C:2007:251, paragraphs 69 and 70.

<sup>47</sup> *Alevizos*, *supra* note 46, para. 70.

<sup>48</sup> *Nottebohm*, Judgment of 6 April 1955, Second Phase, ICJ Reports 1955, p. 4, at p. 23, cited in Opinion of AG Sharpston in *Brouillard*, C-298/14, EU:C:2015:408, footnote 21.

<sup>49</sup> *Nottebohm*, *supra* note 48, para. 23.

<sup>50</sup> See Opinion of Advocate General La Pergola in *Pereira Roque*, C-171/96, EU:C:1997:425, para 31; *Hadadi*, Opinion of Advocate General Kokott, Case C-168/08, EU:C:2009:152, Advocate General Kokott referred to *Nottebohm* in reference to the principle that of priority of the more effective nationality, which has long been recognised in international law regarding the right of States to afford diplomatic protection (at para. 52).

<sup>51</sup> Judgment in *Janko Rottman v Freistaat Bayern*, C-135/08, EU:C:2010:104.

<sup>52</sup> *Rottman*, *supra* note 51, para 39.

<sup>53</sup> *Rottman*, *supra* note 51, para 42.



principle of international law that “questions of nationality are in principle within the reserved domain of States”. In this regard, AG Maduro cites the Permanent International Court of Justice Advisory Opinion *Nationality Decrees Issued in Tunis and Morocco*<sup>54</sup> and the *Nottebohm* case.<sup>55</sup>

### 3.4 Law of the Sea

The CJEU has also been an active court in the field of the law of the sea. On a number of occasions, the CJEU has been called upon to determine the customary law status of principles in this field.

One of the most important cases in this field is *Poulsen*.<sup>56</sup> *Poulsen* involved a challenge to EC legislation on the grounds that it violated international law of the sea. The Danish prosecutor brought proceedings against Poulsen on charges that they had transported and stored on board their vessel salmon caught in the North Atlantic, in contravention of an EC Regulation intended to protect fishery resources.<sup>57</sup> The company that owned the vessel was registered in Panama, and the vessel was registered in Panama and flew the Panamanian flag. The master and crew were Danish, and the vessel was normally berthed in Denmark between voyages. The referring Danish Court asked whether Article 6 of the Regulation should be interpreted as applying to all nationals of the Member States, whatever the country in which the fishing vessel concerned is registered and whatever flag it flies, and regardless of where the vessel is located. The Court held that Article 6 of the regulation must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea. The Court found this to include the *Convention on the Territorial Sea and the Contiguous Zone*<sup>58</sup>, the *Convention on Fishing and Conservation of the Living Resources of the High Seas*<sup>59</sup> as well as the *United Nations Convention on the Law of the Sea*.<sup>60</sup> The Court found that a vessel registered in a non-EC state could not be treated as a vessel with the nationality of an EC Member State on the ground that it has a ‘genuine link’ with that Member State. It also found that Community legislation could not be applied in respect to a vessel of a non-EC Member country in the exclusive economic zone of

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<sup>54</sup> See *Advisory Opinion of 7 February 1923 on Nationality Decrees Issued in Tunis and Morocco*, Series B No 4 (1923), p. 24, cited in Opinion of Advocate General Maduro, *Janko Rottmann v Freistaat Bayern*, Case C-135/08, EU:C:2009:588, para. 18.

<sup>55</sup> *Nottebohm*, *supra* note 48.

<sup>56</sup> Judgment in *Anklagemindigheden v Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453.

<sup>57</sup> Council Regulation (EEC) No 3094/86 of 7 October 1986, laying down certain technical measures for the conservation of fishery resources (OJ 1986 L 288, p. 1).

<sup>58</sup> *Convention on the Territorial Sea and the Contiguous Zone* (29 April, 1958) 516 UNTS 205, entered into force 10 September 1964.

<sup>59</sup> *Convention on Fishing and Conservation of the Living Resources of the High Seas* (29 April 1958) 559 UNTS 285, entry into force 20 March 1966.

<sup>60</sup> *United Nations Convention on the Law of the Sea* (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994 (‘UNCLOS’).

a Member State as it enjoys freedom of navigation in that area. Under international law of the seas, a vessel in principle has only one nationality, that of the State in which it is registered. Nothing in the legislation suggested that the European Community intended to impose obligations on European Community nationals on the basis of personal jurisdiction. The Court found that there was nothing in the text or preamble of the Regulation in question that demonstrated that it was intended to apply on the basis of personal jurisdiction.

This judgment is important insofar it states that the EU “must respect international law in the exercise of its powers”. The CJEU found that the Regulation in question “must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.”<sup>61</sup> One of the questions in this regard was whether UNCLOS represented customary international law at the relevant time. In order to address this issue, the CJEU cited the ICJ cases in *Delimitation of the Maritime Boundary in the Gulf of Maine Region*,<sup>62</sup> *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)*,<sup>63</sup> and *Nicaragua v United States of America*.<sup>64</sup> The Court held that the EU must exercise its powers in conformity with customary international law.<sup>65</sup> However, although the Court was quite thorough in its assessment of the state of international law of the sea, its engagement with the ICJ cases remains rather shallow.

In *Salemink*<sup>66</sup> the referring Court asked whether certain professional activity, which took place on a gas-drilling platform on the continental shelf adjacent to the Netherlands, outside the Netherlands’ territorial waters, was covered by EU law. The Court referred in this instance to the ICJ’s *North Sea Continental Shelf Cases*<sup>67</sup> and Article 77 of UNCLOS and determined that a Member State has sovereignty (although limited) over the continental shelf adjacent to it. The Court concluded that “[a] Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.”<sup>68</sup> Work carried out at an offshore installation on the continental shelf should therefore be understood as having taken place within the territory of the Netherlands for the purposes of EU

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<sup>61</sup> Poulsen, *supra* note 56, para. 9.

<sup>62</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Region* ICJ [1984], p. 294, para. 94.

<sup>63</sup> *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* ICJ [1985], p. 30, para. 27.

<sup>64</sup> *Nicaragua v United States of America*, substantive issues, ICJ [1986], p. 111-112, paras 212 and 214.

<sup>65</sup> B. Brandtner and H-P Folz, ‘The International Practice of the European Communities: Current Survey’ 4 *European Journal of International Law* (1993) 430, 442.

<sup>66</sup> Judgment in *Salemink*, C-347/10, EU:C:2012:17.

<sup>67</sup> *North Sea Continental Shelf*, *supra* note 8.

<sup>68</sup> *Salemink*, *supra* note 66, para. 36.

law. Similarly in *Weber* the Court held that “in the absence of any provision in the Brussels Convention governing that aspect of its scope or any other indication as to the answer to be given to this question, reference must be made to the principles of public international law relating to the legal regime applicable to the continental shelf and, in particular, the Geneva Convention...”<sup>69</sup> In *Salemink*, the CJEU dealt with questions relating to the rules and principles of international law relating to the legal regime applicable to the continental shelf. The Opinion of Advocate General Cruz Villalón also referenced the ICJ’s relevant case law. He argued that there is no separate definition of ‘EU territory’, and that the territorial scope of the EU Treaties can only be ascertained “within the framework of international law by means of treaties establishing boundaries.”<sup>70</sup> The AG cited the ICJ Advisory Opinion in *Libyan Arab Jamahiriya/Chad*<sup>71</sup> to support the proposition that under international law: “[t]hat boundaries have greater permanence than the treaties which establish them shows the extraordinary importance of territorial limits as a factor in the stability of the international community.”<sup>72</sup> In *Weber*, the CJEU also referred to the *North Sea Continental Shelf* cases when referring to the rights of the coastal state regarding the area of the continental shelf.<sup>73</sup>

### 3.5 Jurisdiction and Territory

The CJEU has dealt with ICJ case law when dealing with issues of jurisdiction and territorial scope of treaties.

In *Air Transport Association of America and Others (ATAA)*,<sup>74</sup> the CJEU was called upon to decide whether an EU directive that extended the EU’s scheme for greenhouse gas emission allowance trading<sup>75</sup> to international aviation was consistent with international law. The EU’s Emissions Trading Scheme (ETS) applied to flights that arrive or depart from the territory of an EU Member State. It applied to the entire flight, even in cases where the majority of the flight took place outside the airspace of EU Member States. It was argued that the EU’s ETS was in violation of a number of international treaties, as well as customary international law binding upon the Union. In particular, it

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<sup>69</sup> Judgment in *Weber*, C-37/00, EU:C:2002:122, para. 31.

<sup>70</sup> Opinion of Advocate General Cruz Villalón, *Salemink*, C-347/10, EU:C:2011:562, para. 43.

<sup>71</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, p. 37.

<sup>72</sup> Opinion of Advocate General Cruz Villalón, *Salemink*, *supra* note 70, footnote 13.

<sup>73</sup> *North Sea Continental Shelf*, *supra* note 8, quoted in *Weber*, *supra* note, 69 para 34.

<sup>74</sup> Judgment in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864 (‘ATAA’).

<sup>75</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 25 OJ 2003 L 275, p. 32, 25 October 2002.

was argued that the Directive violated customary international law based on its ‘extra-territorial effects’.

ATAA gives some insight into how the CJEU decides whether a rule has customary international law status. First, the CJEU examines whether the customary rule in question is codified in an international treaty.<sup>76</sup> In ATAA, the CJEU noted that the principles being invoked are enshrined in Article 1 of the Chicago Convention,<sup>77</sup> Article 2 of the Geneva Convention of 29 April 1958 on the High Seas,<sup>78</sup> UNCLOS.<sup>79</sup> Second, the Court refers to the jurisprudence of the ICJ<sup>80</sup> and the PCIJ.<sup>81</sup> Third, the Court takes into account whether any of the parties contested the existence of the rules of customary international law in their written observations or during court proceedings.<sup>82</sup> The Court’s approach is less clear, however, when a rule’s customary status is contested. This was the case regarding the alleged principle “that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered”.<sup>83</sup> In ATAA, the Court did not conduct its own analysis of whether this was a principle of customary international law, but merely stated that “insufficient evidence exists to establish” that the principle of exclusive flag-state jurisdiction of vessels would apply by analogy to aircraft flying over the high seas.<sup>84</sup>

Advocate General Kokott discussed the ICJ jurisprudence in more detail. First, Kokott referred to the Article 38(1)(b) of the ICJ Statute to find that customary international law is one of the generally recognised sources of international law.<sup>85</sup> Second, she refers to ICJ cases in order to introduce to the

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<sup>76</sup> See Judgment in *Poulsen*, *supra* note 61. The Court took into account the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone UNTS vol 16; Geneva Convention of 29 April 1958 on the High Seas, UNTS vol 450, p. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958) 559 UNTS 285, entry into force 20 March 1966; and the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994, “in so far as they codify general rules recognized by international custom”, para. 10.

<sup>77</sup> *Convention on International Civil Aviation* (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention).

<sup>78</sup> *Convention on the High Seas* (done 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

<sup>79</sup> ATAA, *supra* note 74, para. 104.

<sup>80</sup> ATAA, *supra* note 74, para. 104. Judgment International Court of Justice of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 392, paragraph 212. Kuijper notes that “Normally, the Court will adduce judgments of the ICJ in order to confirm that certain provisions of international conventions to which the EU is not a party are declaratory of customary international law.” P.J. Kuijper, “It Shall Contribute to ... the Strict Observance and Development of International Law” *The Role of the Court of Justice* in A. Rosas, E. Levits, Y. Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (The Hague, TMC Asser Press, 2013) 597.

<sup>81</sup> ATAA, *supra* note 74, para. 104. Judgment of the Permanent Court of International Justice of 7 September 1927 in the Case of the S.S ‘*Lotus*’, PCIJ 1927, Series A, No 10, p. 25.

<sup>82</sup> ATAA, *supra* note 74, para. 105.

<sup>83</sup> ATAA, *supra* note 74, para. 106.

<sup>84</sup> ATAA, *supra* note 74, para. 106.

<sup>85</sup> Opinion of Advocate General Kokott in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:637, para. 115.

two-element test, whereby “a settled practice on the part of the particular subjects of international law (*consuetudo*; objective element), which is recognised as a rule of law (*opinio juris sive necessitatis*; subjective element).”<sup>86</sup> Note that AG Kokott refers to *subjects* of international law, not States, as the ICJ did. The *Continental Shelf Cases* to which the AG refers, mentions that “[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>87</sup> In *Nicaragua*, to which the AG Kokott also refers, the ICJ said that “[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.” In *Continental Shelf* (Libyan Arab Jamahiriya/ Malta), the ICJ set out that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”<sup>88</sup> Whether customary international law can be developed by legal subjects other than states is a matter of debate, one that has recently dealt with by the International Law Commission.<sup>89</sup> It is interesting to see how the Advocate General takes a proposition established by the ICJ’s jurisprudence and subtly expands it to include other subjects of international law.

The CJEU will more likely refer to ICJ judgments if they have been specifically mentioned in the pleadings of the parties. For instance, in Case C-507/13 *United Kingdom v Parliament and Council*, the UK had argued that the Capital Requirements Directive IV, insofar it applied to employees of institutions located outside the EEA, violated principles of customary international law. The UK argued that the Directive, which was aimed at the remuneration of individuals employed within certain financial institutions, was invalid because as it applied ‘extraterritorially’, in violation of what the UK argued to be a principle of customary international law. Advocate General Jääskinen rejected this argument: “the United Kingdom would simply be wrong if it sought to claim that only territorial jurisdiction to legislate is permitted under international law.”<sup>90</sup> AG Jääskinen discussed the ICJ cases referred to by the UK – *Anglo-Norwegian fisheries* case, *Nottebohm*, *Arrest Warrant*, *Lotus*, and *Barcelona Traction* – and found that none of the authorities supported a principle of international law against extraterritoriality.

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<sup>86</sup> Opinion of Advocate General Kokott, *supra* note 86, para 115.

<sup>87</sup> *North Sea Continental Shelf*, *supra* note 8, para 77. Emphasis added.

<sup>88</sup> *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya/Malta) (Judgment) [1985] ICJ Rep 13, 27.

<sup>89</sup> See, International Law Commission, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, International Law Commission Sixty-seventh session, Geneva, (4 May-5 June and 6 July-7 August 2015), Un Doc A/CN.4/682. See further, J. Odermatt, ‘The Development of Customary International Law by International Organizations’ 22 *International and Comparative Law Quarterly* 2 (2017).

<sup>90</sup> Opinion of Advocate General Jääskinen in *UK v Parliament and Council*, C-507/13, EU:C:2014:2394, para 38.

## 4 The Law of Treaties

The second area in which the CJEU has engaged with ICJ jurisprudence is in the field of the international law of treaties. As mentioned above, the CJEU does not apply the principles of the VCLT to interpret the EU Treaties, but has used those principles to interpret international agreements to which the EU is a party. Although the EU is not a party to the VCLT, the CJEU has found that such principles can be applied to the EU to the extent that they represent customary international law.

### 4.1 Treaty Interpretation

The main way in which the CJEU applies the VCLT principles is through treaty interpretation. Article 31(1) VCLT sets out the general rule of treaty interpretation: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>91</sup> The CJEU has also used article 31(2)(c), which states that an interpreting body may also take into account, for the purposes of interpretation “[a]ny relevant rules of international law applicable in the relations between the parties.”

### 4.2 Preparatory Work

The VCLT allows an interpreting body to take into account the preparatory work of the treaty as a supplementary means of interpretation.<sup>92</sup> While the CJEU has been highly reluctant to employ *travaux préparatoires* in interpreting the EU Treaties or EU law, it has been somewhat open to examining preparatory work when interpreting international agreements.

In *Bolbol*, the Advocate General went into quite some detail examining the drafting history behind the *Geneva Convention of 28 July 1951 Relating to the Status of Refugees*.<sup>93</sup> According to Ms Bolbol, a stateless Palestinian, the purpose of Article 1D of the Refugee Convention was to make clear that a person registered or entitled to be registered with United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), but residing outside the area in which UNRWA operates, should be automatically granted refugee status. AG Sharpston examined the *travaux préparatoires* related to the 1951 Convention and found that the drafting conference “had the situation in Palestine uppermost in its mind” when it drafted Article 1D. To support this interpretation, AG

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<sup>91</sup> *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 (‘VCLT’).

<sup>92</sup> Article 32 VCLT.

<sup>93</sup> Opinion of Advocate General Sharpston in *Bolbol*, C-31/09, EU:C:2010:119, paras 41-47.

Sharpston took into account the fact that treaty provisions may be interpreted in light of the ‘contemporaneous common will’ of the drafting parties, relying on the ICJ’s judgments in *Land and Maritime Boundary between Cameroon and Nigeria*<sup>94</sup> and the decision of the Eritrea-Ethiopia Boundary Commission, which refers to the *Argentina/Chile Frontier Case*.<sup>95</sup> AG Sharpston also refers to the interpretive practices of other international dispute settlement bodies, which have taken into account the object and purpose of the treaty, in accordance with the rule of interpretation set out in the VCLT.<sup>96</sup> AG Sharpston mentions that the ICJ has not yet ruled on the interpretation of Article 1D of the 1951 Convention.<sup>97</sup> Finally, the AG also mentioned that the ICJ when discussing the question whether UN General Assembly Resolutions should be considered ‘law’ *sticto sensu*. The AG noted that the question had not been resolved by the ICJ, and referred to the *Nuclear Weapons Advisory Opinion* (1996).<sup>98</sup>

The CJEU, however, did not examine the drafting history of the Convention, since it found the wording of Article 1D to be sufficiently clear.<sup>99</sup> There are few occasions where the CJEU will use preparatory work to aid interpretation. The *Libyan Arab Jamahiriya v Chad* case has been cited in support of the contention that *travaux préparatoires* constitute a *supplementary* source, whereas the treaty itself is the primary source for interpretation.<sup>100</sup> Another reason for this reluctance stems from the CJEU’s general inclination towards teleological reasoning in EU law.<sup>101</sup> However, it has been noted that the CJEU’s reluctance to refer to *travaux préparatoires*, both when dealing with international law and EU law, might be slowly waning, as preparatory materials are becoming more available.<sup>102</sup>

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<sup>94</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002, p. 303, para. 59, quoted in Opinion of Advocate General Sharpston in *Bolbol*, *supra* note 93, at footnote 42.

<sup>95</sup> Decision on Delimitation of the Border between Eritrea and Ethiopia, delivered on 13 April 2002 by the Eritrea-Ethiopia Boundary Commission at paragraphs 3.3, 3.4 and 3.13.

<sup>96</sup> *Libyan Arab Jamahiriya/Chad*, *supra* note 71 paragraph 41, cited at *Bolbol*, *supra* note 93, footnote 62.

<sup>97</sup> Opinion of Advocate General Sharpston in *Bolbol*, *supra* note 93, at 37.

<sup>98</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, cited in Opinion of Advocate General Sharpston in *Bolbol*, *supra* note 93, footnote 6.

<sup>99</sup> Judgment in *Bolbol*, C-31/09, EU:C:2010:351, para. 51.

<sup>100</sup> Opinion of Advocate General Saggio in *Portugal v Council*, C-149/96, EU:C:1999:92, para. 20.

<sup>101</sup> P.J. Kuijper, ‘The European Courts and the Law of Treaties: The Continuing Story’ in E. Cannizzaro (ed), *The Law of Treaties Beyond the Geneva Convention* (Oxford, Oxford University Press, 2011) 256, 260: “[t]here has always been a tendency at the Court to argue that the special character of the Community legal order required special, more teleologically oriented, interpretation methods than was usual in international law.” C. Brölmann, ‘Specialized Rules of Treaty Interpretation: International Organizations’ in D. B. Hollis, *Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012) 517: “in its (sparse) references to the rules of interpretation as part of the general law of treaties, the CJEU can be seen to employ a large degree of teleological reasoning coupled with a reluctance to use the *travaux préparatoires* as a supplementary means of interpretation.”

<sup>102</sup> See S. Miettinen and M. Kettunen, ‘*Travaux* to the EU Treaties: Preparatory Work as a Source of EU Law’ 17 *Cambridge Yearbook of European Legal Studies* (2015) 145–167.

### 4.3 Subsequent practice

Article 31 VCLT also allows an interpreting body to examine ‘subsequent practice’ of the parties to a treaty, which establishes an agreement regarding the treaty’s interpretation.<sup>103</sup> As with preparatory work, the CJEU is reluctant to use subsequent practice of the parties to aid interpretation, both in EU law, and regarding international agreements.

In *Oberto* (‘European Schools’), one of the questions dealt with by the CJEU was whether the subsequent practice of the parties to a treaty could override the terms of that treaty. The CJEU made a rather bold remark in this regard, stating that “as is clear from the case-law of the International Court of Justice, the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties’ agreement”.<sup>104</sup> The CJEU cited the ICJ’s 1962 Temple of *Preah Vihear* (Cambodia v Thailand) for authority for that statement. The CJEU sought to interpret the Convention defining the Statute of the European Schools taking into account the ‘subsequent practice’ of the parties. While an interpreting body may make recourse to the subsequent practice of the parties to ascertain the context, it is less clear whether such practice may override the clear terms of a treaty.

In *Front Polisario*,<sup>105</sup> AG Wathelet strongly criticized the CJEU’s approach in *Oberto*. First, he noted that the *Preah Vihear* case pre-dates the VCLT, and cannot be considered as concerning the interpretation of Article 31(3)(b) VCLT, which did not exist at the time of the ICJ judgment. Moreover, AG Wathelet argues that there is nothing in *Preah Vihear* to support the CJEU’s bold assertion: “I cannot see anywhere in that judgment that the International Court of Justice held, whether expressly or not, that the subsequent practice followed in the application of a treaty could override the clear terms of that treaty.”<sup>106</sup> He notes that the ICJ judgement concerned notions of estoppel or acquiescence in international law, and not subsequent practice. AG Wathelet was open to the idea that subsequent practice could override the terms of a treaty, but would set a very high bar for this: only in cases where it is “known to and accepted by the parties and is sufficiently widespread and sufficiently long term to constitute *a new agreement in itself*.”<sup>107</sup> In *Front Polisario*, the CJEU found that the subsequent practice of the EU and Morocco relating to the interpretation of an

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<sup>103</sup> Art. 31 (2) (b) VCLT. See G. Slyn, ‘The Use of Subsequent Practice as an Aid to Interpretation by the Court of Justice of the European Communities’ in R. Bieber and G. Ress (eds) *Die Dynamik des Europäischen Gemeinschaftsrechts* (Baden-Baden, Nomos, 1987) 138.

<sup>104</sup> Judgment in *Oberto and O’Leary*, Joined Cases C-464/13 and C-465/1, EU:C:2015:163, para. 61.

<sup>105</sup> Opinion of Advocate General Wathelet in *Front Polisario*, C-104/16 P, ECLI:EU:C:2016:677.

<sup>106</sup> Opinion of Advocate General Wathelet in *Front Polisario*, *supra* note 105, para. 96, para. 93.

<sup>107</sup> Opinion of Advocate General Wathelet in *Front Polisario*, *supra* note 105, para. 96 (emphasis added).



Association Agreement could not override the terms of the treaty relating to the territorial application of that agreement. The CJEU dealt with a number of other public international law issues, including the right to self-determination, in the *Front Polisario* and *Western Sahara Campaign*<sup>108</sup> cases. The CJEU's approaches to international law, including references to ICJ jurisprudence has been discussed in more detail elsewhere.<sup>109</sup>

#### 4.4 Binding Unilateral Declarations

The CJEU has also dealt with rather novel issues in the law of treaties. This was the case in *Venezuelan Fisheries*, where the question arose whether the EU had the capacity to make a 'binding unilateral declaration'. It was uncontested that States could make such declarations, but unclear whether the EU has such capacity, and if so, which procedure under EU law would apply to the creation of such an instrument. The Commission argued that a unilateral binding declaration is essentially equivalent to an international agreement, relying on the ICJ's *Nuclear Tests* case.<sup>110</sup> Advocate General Sharpston noted that the question of whether legal persons other than states, such as the EU, had the capacity to make such unilateral declarations, had not been decided by the ICJ, nor had it been dealt with by the ILC.<sup>111</sup> AG Sharpston noted that, in accordance with the international law principle that obligations cannot be imposed upon a State without its consent, unilateral declarations are binding, even without the acceptance of another party. AG Sharpston refers in this regard to the ICJ's *Nuclear Tests* judgment that dealt with unilateral declarations.<sup>112</sup>

The case also dealt with the definition of a 'treaty' under public international law. AG Sharpston mentioned that the ICJ has suggested that the definition of a treaty in Article 2(1)(a) VCLT reflects customary international law, citing *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening). While the notion of a 'treaty' in international law and an 'agreement' in EU law are very similar, the case law shows that there is some slight difference between the two concepts. The EU tends to have a broader definition than in public international law.

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<sup>108</sup> Judgment in *Western Sahara Campaign UK*, Case C-266/16, EU:C:2018:118.

<sup>109</sup> See J. Odermatt, 'Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16, R (on the application of Western Sahara Campaign UK) v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs' (2019) *European Constitutional Law Review*, 14(4), pp. 751–766; J. Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' *American Journal of International Law*, 111(3), pp. 731–738.

<sup>110</sup> Opinion of Advocate General Sharpston in *Parliament and Commission v Council*, Joined cases C-103/12 and C-165/12, ECLI:EU:C:2014:334, para. 34.

<sup>111</sup> Opinion of Advocate General Sharpston in *Parliament and Commission v Council*, *supra* note 110, para. 85.

<sup>112</sup> Opinion of Advocate General Sharpston in *Parliament and Commission v Council*, *supra* note 110, para. 34.

## 4.5 Fundamental Change in Circumstances

Perhaps one of the most famous instances of the CJEU applying the international law of treaties was in the *Racke* case. In *Racke*,<sup>113</sup> the CJEU relied on the ICJ's judgment in *Gabcikovo-Nagymaros*<sup>114</sup> in support of its conclusion that the principle of fundamental change of circumstances is a customary law principle in the law of treaties. One of the questions in that case related to the termination of an agreement with Yugoslavia based on the *rebus sic stantibus* principle, and whether the outbreak of hostilities in Yugoslavia constituted a fundamental change of circumstances under Article 62 VCLT. The *rebus sic stantibus* principle was also mentioned in the Bilateral Investment Treaties (BITs) cases. *Commission v Austria* and *Commission v Sweden*, dealt with the possible incompatibility between Union law and the bilateral investment treaties of EU Member States with third States. The defendant Member States Austria and Sweden argued that in case of conflict, there were existing mechanisms under public international law that would allow them to avoid applying their BITS, including relying on *clausula rebus sic stantibus*. The CJEU swiftly rejected these arguments.<sup>115</sup> In *Commission v Finland*, which also dealt with Member State BITs, AG Sharpston also rejected the argument that the fundamental change of circumstances could be relied upon, citing the part of *Gabčíkovo-Nagymaros Project* quoted in *Racke*: “The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.”<sup>116</sup>

## 5 The Development of Principles of EU Law

Another way in which the CJEU has engaged with ICJ jurisprudence is more subtle: when the CJEU develops principles of EU law. In some cases, when developing a certain EU law principle, the CJEU acknowledges that it has origins in public international law. This is the case with regard to the principle of ‘good faith’ in EU law. It is interesting that the CJEU does not apply the principle of good faith as a principle of international law, but rather applies it as an EU law equivalent, the

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<sup>113</sup> Judgment in *Racke v Hauptzollamt Mainz*, C-162/96, EU:C:1998:293, para. 50.

<sup>114</sup> *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7. para. 104.

<sup>115</sup> Judgment in *Commission v Austria*, C-205/06, EU:C:2009:118, paras 38-40, and Judgment in *Commission v Sweden*, C-249/06, EU:C:2009:119, paras 39-41.

<sup>116</sup> Judgment in *Racke*, *supra* note 113, para 50, quoted in Opinion of Advocate General Sharpston in *Commission v Finland*, C-118/07, EU:C:2009:525, at footnote 33.

principle of legitimate expectations.<sup>117</sup> De Baere and Roes have also argued that the duty of loyalty in EU law is an expression of the principle of good faith in international law.<sup>118</sup> Rather than applying an existing international law principle, the CJEU created an EU law equivalent. This approach allows the Court to assert the autonomy of EU law – as it is an independent legal system that does not derive its authority from international law, it applies principles of EU law, even if those principles find their origin in earlier case law.

The CJEU has found that “the principle of good faith is a principle of customary international law the existence of which has been recognised by the International Court of Justice” and is as such binding upon the European Union.<sup>119</sup> The CJEU recognised the principle of ‘legitimate expectations’ as an EU expression of the principle of good faith in *Opel Austria*.<sup>120</sup> In this case, Austria argued that the Council had acted in breach of the principle of good faith in international law when it adopted Regulation No 3697/93 imposing a 5.9% duty on gearboxes produced by General Motors Austria. Opel sought to annul the regulation on the basis *inter alia* that it violated the obligation under international law not to defeat the object and purpose of a treaty before its entry into force. The CJEU found that the principle of good faith was a rule of general international law and thus binding upon the Community. It found this principle of good faith to be the public international law corollary of the EU law principle of the protection of legitimate expectations. The Court referred in this context to the decision of the PCIJ in *Certain German Interests in Polish Upper Silesia*, in which the PCIJ indicated that a signatory state may be “under an obligation to abstain from any action likely to interfere with [the treaty’s] execution when ratification has taken place”.<sup>121</sup> The CJEU found that there was a legitimate expectation on the part of traders such as Opel that the Council and other parties to the EEA Agreement would not act to defeat the object and purpose of that agreement. Interestingly, it was not the principle in Article 18 that gave rise to actionable rights, but the equivalent EU law principle regarding the protection of legitimate expectations. The Council Regulation was not annulled due to a deficiency stemming from public international law, but a violation of a principle of EU law. The Council argued that Article 18 VCLT and VCLT-IO only applied between sovereign

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<sup>117</sup> Judgment in *Opel Austria v Council*, T-115/94, EU:T:1997:3: “the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice [sic] (see the judgment of 25 May 1926, German interests in Polish Upper Silesia, PCIJ, Series A, No 7, pp. 30 and 39) and is therefore binding on the Community.” (para. 90). “the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order.” (para 93.)

<sup>118</sup> G. De Baere and T. Roes, ‘EU Loyalty as Good Faith’, 64 *International & Comparative Law Quarterly* 4 (2014) 829.

<sup>119</sup> Judgment in *Tisza Erőmű kft*, T-468/08, EU:T:2014:235, para. 321.

<sup>120</sup> Judgment in *Opel Austria v Council*, *supra* note 117, para 90-93.

<sup>121</sup> *Certain German Interests in Polish Upper Silesia*, (1925) PCIJ Ser A, No 7, 5.

states and international organizations and since they do not confer rights upon individuals, they could not be invoked in order to challenge the validity of EU acts.<sup>122</sup>

Article 18 VCLT sets out an interim obligation not to defeat the object and purpose of the treaty; it is not intended to allow the provisions of the treaty to be valid prior to its entry into force.<sup>123</sup> As Dörr puts it, “the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force de facto meaningless.”<sup>124</sup> The interim obligation is thus concerned with acts that would make the performance of the treaty difficult or impossible. Did the Regulation in question really defeat the *object and purpose* of the EEA Agreement? One of the purposes of the Agreement was “[to establish] a dynamic and homogeneous European Economic Area.” It is doubtful that the EU’s behaviour threatened the Agreement in such a manner.<sup>125</sup> Although *Opel Austria* is one of the very few judicial pronouncements on Article 18 VCLT,<sup>126</sup> it is not a real application of the interim obligation in international law, but an application of the more general principle of good faith.<sup>127</sup>

Other cases demonstrate that the principle of good faith, not the Article 18 obligation, is applied by the CJEU. Cases such as *Danisco Sugar*,<sup>128</sup> and *Case T-231/04 Greece v. Commission*<sup>129</sup> involved arguments that there had been a breach of the principle of good faith in international law.<sup>130</sup> Yet the cases show that it is the principle of legitimate expectations in EU law, rather than the Article 18 VCLT interim obligation, that is being applied. Klabbers argues that in these cases, and others ostensibly involving the interim obligation, what is actually being applied is a ‘manifest intent’ test.<sup>131</sup> Aust points out that “[t]here is virtually no practice in the application of [Article 18]”.<sup>132</sup> It is doubtful whether these CJEU cases add to this international practice.

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<sup>122</sup> Judgment in *Opel Austria v Council*, *supra* note 117, para. 86.

<sup>123</sup> A. Aust, *Modern Treaty Law and Practice*, 3<sup>rd</sup> edn (CUP, 2013) 107.

<sup>124</sup> O. Dörr, ‘Article 18 - Obligation not to defeat the object and purpose of a treaty prior to its entry into force’ in O. Dörr, K. Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Berlin, Springer, 2012), 220.

<sup>125</sup> See P. Fischer, ‘Case T-115/94, Opel Austria GmbH v. Council, Judgment of 22 January 1997, [1997] ECR II-39’, 35 *Common Market Law Review* 3 (1998) 779.

<sup>126</sup> J. Klabbers, ‘Treaties, Conclusion and Entry into Force’ *Max Planck Encyclopedia of Public International Law*, <<http://opil.ouplaw.com/home/epil>>, para. 13.

<sup>127</sup> See Dörr, *supra* note 124, 222: “it becomes clear that the Court of First Instance was simply applying the good faith principle as such, and not the interim obligation as one of its concrete emanations.”

<sup>128</sup> Judgment in *Danisco Sugar v Allmänna ombudet*, C-27/96, EU:C:1997:563.

<sup>129</sup> Judgment in *Greece v Commission*, T-231/04, EU:T:2007:9.

<sup>130</sup> Judgment in *Greece v. Commission*, *supra* note 129, para. 71.

<sup>131</sup> <sup>131</sup> J. Klabbers, ‘How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent’ 34 *Vanderbilt Journal of Transnational Law* (2001) 283, 330. “if behavior seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of whether anyone’s legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.”

<sup>132</sup> A. Aust, *Modern Treaty Law and Practice*, 1st edn (Cambridge, Cambridge University Press, 2000) 94.

Sometimes the CJEU chooses not to refer to the ICJ, but rather references its own case-law. As an example, in *SECIL*, Advocate General Wathelet discussed the principle of good faith in international law, quoting from the ICJ in *Gabčíkovo-Nagymaros* judgment.<sup>133</sup> The CJEU judgment, however, does not mention the ICJ. The CJEU states that Article 31 VCLT “provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose”.<sup>134</sup> Rather than citing the ICJ, as the Advocate General does, it cites its own previous case law, namely the *Brita* judgment (and the case law it cites). In order to find authority for this principle of international law, the CJEU prefers to cite its own jurisprudence, rather than refer to another international court. In this way, the international law principle becomes internalised – it is no longer just a principle of international law, but one that has been integrated as a principle of *EU law* as well.

The Court of First Instance (now: General Court) also dealt with the principle of good faith in *Case T-231/04 Greece v. Commission*.<sup>135</sup> The Commission and certain Member States entered into a Memorandum of Understanding (MOU) related to the sharing of the costs of their representations in Abuja, Nigeria. The Commission took steps to recover amounts that it believed were due to be paid by Greece under the MOU and Greece disputed this amount. The Commission relied, *inter alia*, on the conduct of Greece and the principle of good faith in international law.<sup>136</sup> The CFI noted that the principle of good faith is a rule of customary international law, which had been recognised by the PCIJ in *German interests in Polish Upper Silesia*.<sup>137</sup> Thus Greece was bound to act in good faith regarding its other memorandum partners.<sup>138</sup> Not only had Greece not informed the other parties of its intention to withdraw from the agreement, it continued to act as a full participant in the project. Therefore, “by reason of the principle of good faith, the Hellenic Republic could not evade its financial commitments by pleading that it had not ratified the additional memorandum.”<sup>139</sup> On appeal, Advocate General Mazák referred to *Australia v France* (Nuclear Tests Case)<sup>140</sup> to support the argument that the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source.”<sup>141</sup> The CJEU found that the Court of First

<sup>133</sup> Opinion of Advocate General Wathelet in *SECIL*, C-464/14, ECLI:EU:C:2016:52, para. 124.

<sup>134</sup> Judgment in *SECIL*, C-464/14, EU:C:2016:896, para. 94.

<sup>135</sup> Judgment in *Greece v Commission*, T-231/04, EU:T:2007:9.

<sup>136</sup> Judgment in *Greece v. Commission*, *supra* note 135, para. 71.

<sup>137</sup> *German interests in Polish Upper Silesia*, CPJI, Series A, No 7, pp. 30 and 39, quoted in Judgment in *Greece v. Commission*, *supra* note 135, para. 85.

<sup>138</sup> Judgment in *Greece v. Commission*, *supra* note 135, para. 97.

<sup>139</sup> Judgment in *Greece v. Commission*, *supra* note 135, para 99.

<sup>140</sup> ICJ, *Australia v France* (Nuclear Tests Case), ICJ Reports 1974, p. 253.

<sup>141</sup> Opinion of Mr Advocate General Mazák in *Greece v Commission*, C-203/07 P, EU:C:2008:270, para. 79.

Instance was entitled to invoke the principle of good faith, “which forms part of general international law”.<sup>142</sup>

## 6 Conclusion

The relationship between the European Union and international law, or between the CJEU and the ICJ, is sometimes framed in terms of ‘coherence’ and ‘fragmentation’ of international law. Kassoti and Louwerse conclude that the CJEU, “rather than proffering its own interpretation of international law, has consistently chosen to defer to the authority of the ICJ.”<sup>143</sup> Rosas also argues that the CJEU has shown deference to the ICJ, partly because of the ICJ’s greater expertise and understanding of public international law issues.<sup>144</sup> According to these authors, the CJEU’s references to the ICJ in this manner contribute to the coherence of international law and diminish risks of international law’s substantive fragmentation. The willingness of the CJEU to refer to the ICJ jurisprudence does tend to show a more open attitude towards international law. Indeed, there are no occasions where the CJEU and ICJ can be seen as diverging on public international law issues. This chapter has argued that the relationship is somewhat more complex than the CJEU showing deference to the ICJ.

First, there are occasions where the CJEU could have referred to the ICJ or to public international law, but rather sought to resolve the issue on ‘EU ground’, rather than engaging with public international law. Take, for instance, the CJEU’s judgment in *Wightman*, a reference for a preliminary ruling on whether the United Kingdom would be able to revoke its notice of intention to leave the EU under Article 50 TEU. Much of the academic debate on this issue revolved around issues of public international law, especially Articles 65, 67 and 68 VCLT. The Opinion of Advocate General Sánchez-Bordona also discussed these provisions in detail, including references to ICJ jurisprudence.<sup>145</sup> The CJEU, on the other hand, resolved the issue entirely within the confines of the EU Treaties, without utilising the VCLT or references to the ICJ. The Court found that its conclusion,

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<sup>142</sup> Judgment in *Greece v Commission*, C-203/07 PEU:C:2008:606, para. 64.

<sup>143</sup> E. Kassoti and L. Louwerse, ‘Like Ships in the Night? The CJEU and the ICJ at the Interface’ *Geneva Jean Monnet Working Papers*, 06/2016, 20.

<sup>144</sup> A. Rosas, ‘With a Little Help From My Friends: International Case-Law as a Source of Reference for the EU Courts’ (2005) *The Global Community Yearbook of International Law & Jurisprudence* 203, 230.

<sup>145</sup> Opinion of Advocate General Sánchez-Bordona in *Wightman*, Case C-621/18, EU:C:2018:978, para. 54: “In the judgment of 3 February 2006, *Armed activities on the territory of the Congo* (Democratic Republic of the Congo v Rwanda) (new application: 2002), I.C.J. Reports, 2006, p. 6, paragraph 125, the International Court of Justice held that Article 66 of the VCLT was not declarative of international law. However, the same court, in the judgment of 25 September 1997, *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), I.C.J. Reports 1997, p. 7, paragraph 109, held that Articles 65 and 67 of the VCLT if not codifying customary law, at least reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.”

that a Member State could revoke its notification of intention to withdraw, “is *corroborated* by the provisions of the Vienna Convention on the Law of Treaties”.<sup>146</sup> Here the CJEU is not diverging from the ICJ, but simply not engaging with it. This confirms a more general pattern whereby the Advocates General are much more likely to refer to ICJ cases than the Court. This does not mean necessarily that the Court disregards the ICJ in these instances, but that it implicitly accepts the AG’s arguments. There are few instances where the Court has taken a different path from that of the Advocate General on issues of international law.

There are areas where ICJ case law is conspicuously absent. The ICJ is rarely mentioned, for instance, regarding principles of international responsibility. ICJ/PCIJ case law has been cited in passing to support the international law principle that the breach of an engagement involves an obligation to make reparation in an adequate form.<sup>147</sup> This absence of engagement with the ICJ in this field arguably demonstrates how the CJEU sees the system of responsibility in the EU context as distinct from that of international law. Similarly, the CJEU rarely refers to ICJ case law regarding the law of international institutions.<sup>148</sup> This also accords with the CJEU’s view that the EU legal order is an autonomous one, and law regarding international organizations is not generally applicable to that of the EU.

Second, even where the CJEU and Advocates General refer to or engage with ICJ jurisprudence, the CJEU may nevertheless put its own spin on international law issues. This is understandable given the very different functions of international law before the two courts. The CJEU is focused on resolving questions of EU law – public international law is thus dealt with as a subsidiary means of interpreting and applying EU law and the EU Treaties. Just as light is distorted as it passes through glass, international law and ICJ jurisprudence is modified as it passes through the prism of EU law. It may appear, therefore, that the CJEU’s references to ICJ jurisprudence contribute to the unity and coherence of international law – but upon closer inspection, there are subtle changes that take place when passing through this prism.

Third, this research shows how issues of public international law can be slowly transformed into issues of EU law, and that references to ICJ jurisprudence will be replaced by previous CJEU

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<sup>146</sup> Judgment in *Wightman*, Case C-621/18, EU:C:2018:999 para. 69. Emphasis added.

<sup>147</sup> Opinion of Advocate General Tesauro in *Brasserie du pêcheur*, C-46/93, EU:C:1995:407, para. 38, referring to *Case concerning the Factory at Chorzów*, CPGI, Series A, p. 21 and Advisory Opinion of 30 March 1950 on the interpretation of peace treaties with Bulgaria, Hungary and Romania, CGI, 1950, p. 228. (Emphasis added).

<sup>148</sup> Advocate General Bobek examined practice regarding access to judicial documents in the EU Member States as well as the practice of international courts, in Case C-213/15 P *Commission v Patrick Breyer*, EU:C:2016:994, para 110. AG Bobek looked at the ICJ, among other international courts, and Article 53 of the ICJ’s Rules of Court, which provides that the Court may make pleadings and documents available, upon ascertaining the views of the parties.

judgments. It is interesting to see how concepts that originate in public international law, such as those relating to nationality, can be transformed into principles of EU law. The principle of good faith, a recognised principle of customary international law, is transformed and given expression as EU law principles, such as loyalty and the protection of legitimate expectations. Once transformed into principles of EU law, the CJEU can then interpret and apply these principles autonomously, without the need to refer to the ICJ jurisprudence. By using public international law principles to develop concepts of EU law, the CJEU still has a subtle effect on the development of international law.

The courts of The Hague and Luxembourg operate in very different worlds. Yet the CJEU is no longer, if it ever really was, solely an economic court, and now deals with questions related to sovereignty, the law of the sea, migration, trade, sanctions and terrorism. These issues, by their very nature, touch upon questions of public international law. One might expect that as the EU becomes more globally active, and that more cases deal with public international law issues, the CJEU would also cite and discuss ICJ jurisprudence. The other trend, however, is towards the CJEU asserting the autonomy of EU law, especially towards the international legal order. This means that the CJEU will refer to the ICJ, but that it will have a relatively minor role in the CJEU's legal reasoning. It may be used to fill gaps, or to support certain legal arguments, but it is not followed as if it were a hierarchically superior court. Moreover, it should be noted that the CJEU's practice of citing ICJ jurisprudence is far from consistent. Whether the ICJ is mentioned at all appears to depend on the preference of the judges or Advocates General, or whether the parties to the case used ICJ judgments in their legal argumentation.

The ICJ is mainly referred to in three main ways: to support the existence of a rule of customary international law, to identify rules of treaty interpretation, and to develop principles of EU law. Whereas the ICJ contributes to the universality and general application of international law, the CJEU is much more focused on preserving the integrity and autonomy of the EU legal order. The CJEU and Advocates General occasionally refer to ICJ judgments, but this is not done habitually, and principles that are developed at the international level can soon be absorbed into the EU legal order. Yet if the EU is to truly respect international law in the exercise of its powers, and to uphold and enforce international law, this will require a more thorough engagement with the ICJ's reasoning, rather than casual (and random) references to particular ICJ judgments.



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